
(2012) 12 BOM CK 0128
In the Bombay High Court
Case No : Criminal Appeal No. 975 of 2005

Amakka Shankar Potraj	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 34, 498A

Citation : (2012) 12 BOM CK 0128

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : N.P. Shimpi, for the Appellant; D.P. Adsule, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Heard rival arguments on this Appeal preferred by the appellants/orig. accused Nos. 1 & 2 challenging the judgment and order of conviction dated 29th August, 2005 passed by the III Adhoc Additional Sessions Judge, Solapur in Sessions Case no. 109 of 2005. By the impugned judgment and order, appellants/orig. accused Nos. 1 & 2 were convicted for the offence punishable u/s 498A of IPC read with Section 34 of IPC and were sentenced to suffer RI for three years and to pay fine of Rs. 500/- each, in default to suffer further RI for three months each. Both the appellants were also convicted for the offence punishable u/s 302 read with Section 34 of IPC and were sentenced to suffer RI for life and to pay fine of Rs. 1000/- each, in default RI for three months. By the same judgment and order, original accused No. 3 was acquitted of all the charges. There is no appeal against the said acquittal, preferred by the State. Original accused Nos. 1 & 2 who are mother-in-law and husband of victim Yallamma preferred the present appeal.

2. The case of the prosecution in nutshell is as under :-

Some time six months prior to the incident, the victim Yellamma got married

with appellant/accused No. 2 Venkatesh. Initially for about four months, Yellamma was treated normal. However, thereafter there used to be quarrels and torture of Yellamma at the hands of her husband (appellant/accused No. 2) and also at the hands of her in-laws i.e. appellant/accused No. 1 and acquitted accused No. 3. The accused persons were doubting the character of Yellamma alleging that she had some illicit relations with her maternal uncle by name Krishna Mhetre. It is also the case of prosecution that for some time prior to the incident which took place on 26.1.2005, Yellamma and her husband/appellant No. 2 resided at Pune as appellant No. 2 was having the work in the building construction line. Apparently they resided there happily. They came back to the residence of the in-laws of the victim at Solapur on 26.1.2005 at early hours and in fact the incident of victim Yellamma receiving severe burn injuries due to pouring of kerosene, occurred at about 11:00 a.m. on the same day. According to the case of prosecution on the day of the incident at about 11:00 a.m., there was quarrel and in which both the appellants took part in pouring kerosene over the person of Yellamma and setting her on fire. According to the more specific case of the prosecution after the kerosene was poured on the person of Yellamma, appellant/accused No. 1 (i.e. mother-in-law of the victim) set her on fire by using ignited match-stick. Apparently in the said incident of burning, Yellamma received about 94% burns and mostly on her limbs and also on face, chest and abdomen. Noticing the commotion from the house of the appellants/accused and hearing the hue and cry as well as shouts made by victim Yellamma, the neighbours gathered there and tried to extinguish the fire. Intimation was given to the relatives of Yellamma by some neighbours. PW-2 Narassappa, paternal uncle of the victim, reached the spot and noticed the situation and asked his one son to bring auto-rickshaw. In the auto-rickshaw the victim was taken to Civil Hospital, Solapur. According to said PW-2 Narassappa, while on the way to the hospital, victim gave her dying declaration taking the name of the appellants as pouring kerosene on her person and setting her on fire.

3. Also according to the case of prosecution, PW-3 one Nagnath, son of PW-2 reached the hospital after knowing regarding the incident of burning. He met the victim who was then under treatment and according to said PW-3 Nagnath again the victim narrated the entire incident as to appellants/accused pouring kerosene on her person and setting her on fire.

4. Intimation was given to the Sadar Bazaar police station as well as to the Civil Hospital, Solapur regarding admission of the victim Yellamma in the hospital for burn injuries. Accordingly, one PSI Jadhav (PW-10) attended the hospital and after ascertaining the condition of victim as able to give statement, recorded her statement which is at Exh. 31 and apparently it was treated as First Information Report. On the basis of the said statement, offence was registered and investigation was started during which intimation was given to one Special Judicial Magistrate one Mohd. Chiniwar (PW-4). Accordingly he attended the Civil Hospital, Solapur and after obtaining the endorsement from the attending doctor Madhusudan (PW-9), regarding condition of the patient, recorded the statement

of the victim. It was recorded apparently between 12:45 p.m. to 1:00 p.m. Again in the said statement allegations were made against the appellants/accused as to pouring kerosene on her person and setting her on fire.

5. The offence was registered initially against all the three accused persons i.e. present appellant/accused Nos. 1 & 2 and acquitted accused No. 3 - father-in-law of the victim. During investigation, spot panchnama was conducted in which PW-6 one panch by name Laxman took part. Also during the investigation, the partly burnt clothes of the victim were taken charge of under different panchnama in which PW-7 another panch by name Ramesh took part. On the same day, statements of the witnesses were recorded and all the three accused were put under arrest on 28.1.2005. By that time, the victim who was under treatment at Civil Hospital, Solapur died at about 7:00 a.m. on 28.1.2005. After completion of investigation, charge-sheet was filed and the matter was committed to the Court of Sessions. It was tried and disposed of by impugned judgment and order wherein original accused No. 3 was acquitted and present appellants/accused Nos. 1 & 2 were convicted for the offences charged.

6. Admittedly, the entire case of the prosecution is based on the circumstantial evidence and mainly on the evidence of dying declarations of the victim Yellamma. In order to have proper perspective of the matter and to ascertain the scope of the arguments advanced on behalf of the appellants/accused Nos. 1 & 2, certain factual position is required to be mentioned as under :-

[i] Death of victim Yellamma occurred just within four or six months of her marriage with appellant/accused No. 2. It must be mentioned that there is no cognate material coming before the trial Court as to on which date the marriage between appellant/accused No. 2 and Yellamma took place. According to the dying declaration given before the PSI Jadhav, she got married with Venkatesh in September, 2004. Admittedly, the incident of burning occurred on 26.1.2005 and according to the said dying declaration which at Exh. 31, though there is mention that marriage occurred in September, 2004, for four months after the marriage she was treated well and thereafter for two months she was being ill-treated and harassed by the appellants on the allegation that she had illicit relations with her maternal uncle Krishna Mhetre, in any event it is a factual position that the death of victim occurred just within four to six months of her marriage.

[ii] It is a case of custodial death and the victim sustained severe burn injuries when she was staying at her matrimonial house and when all the accused persons were staying together on the day of the incident.

[iii] Victim sustained 94% burn injuries and it was a case of unnatural death and the death was due to burns caused by setting the victim on fire after pouring of kerosene.

[iv] The victim died while under treatment at Civil Hospital, Solapur at 7:00 a.m. on 28.1.2005.

7. Bearing in mind the above factual position, the arguments advanced on behalf of the appellants/accused are required to be construed. The main thrust of the argument was on the genuineness or otherwise of the dying declarations allegedly given by the victim. In the present matter, the first written dying declaration was given to PSI Jadhav after he attended the hospital, which is at Exh. 31 in the notes of evidence, and it was immediately taken after admission of the victim in the hospital. It must be mentioned that prior to recording of the said dying declaration, the condition of the victim was ascertained and to that effect the attending doctor PW-9 Madhusudan gave his endorsement. We have carefully gone through the said Exh. 31. We have gone through the substantive evidence of the attending doctor PW-9 Madhusudan, wherein he has specifically mentioned as to the condition of the victim to give statement. Even such endorsements are appearing on the dying declaration Exh. 31 with timings.

8. Apart from the dying declaration to the police officer (Exh. 31), immediately within short time there was another dying declaration recorded by a Special Judicial Magistrate one Mohd. Chiniwar (PW-4). It is at Exh. 11 in the notes of evidence. It was recorded, as mentioned above, on the same day at 12:45 p.m. to 1:00 p.m. Again at this time the said Special Judicial Magistrate ascertained himself through the attending doctor PW-9 Madhusudan regarding the condition of the victim. In fact such endorsements were also given on the said dying declaration which is recorded in vernacular Marathi and is at Exh. 11 in the notes of evidence. At the starting of the said dying declaration (Exh. 11) there is an endorsement by PW-4 SJM to the following effect : "Civil Hospital casualty. Before recording the statement I satisfied myself patient was in conscious condition." Prior to this, there is also an endorsement of the attending doctor at 12:45 p.m. on 26.1.2005 to the effect that "patient is conscious to give oral statement". In fact, this is the endorsement which has been proved by the attending doctor (PW-9) and it is Exh. 28 in the notes of evidence wherein specific time was written by the side of the signature of the attending doctor.

9. Apart from the above two dying declarations, there are three oral dying declarations which can be considered as corroboration to the earlier written dying declarations. Such oral three dying declarations are in fact revealed from the substantive evidence of PW-2, PW-3 & PW-9. So far as PW-2 Narasappa, paternal uncle of the victim is concerned according to him while he was taking the victim in auto-rickshaw for admitting her to the Civil Hospital, she had narrated the entire incident alleging the role against the appellants/accused as to pouring kerosene and setting her on fire. There is another oral dying declaration before PW-3 Nagnath, one of the sons of PW-2 Narasappa. According to this witness PW-3 Nagnath, he met the victim at the hospital and on enquiry with her, she revealed the entire story and the same is in consonance with what is stated before PW-2 Narasappa. Third dying declaration is in fact in the form of recording of the history, done by PW-9 Dr. Madhusudan at the time of admission of the patient. The substantive evidence of said PW-9 Dr. Madhusudan is worth mentioning with advantage as under : "she was brought by Sidram Ballappa

Gopireddy. Patient gave history of homicidal burns by pouring of kerosene and alighting by her mother-in-law and husband, and father-in-law at 11 a.m." In fact the further substantive evidence of said medical officer is worth mentioning which show the immediate condition of the said patient when he had examined the patient. Said evidence reads as under :

I examined the patient Yellamma. She smelling kerosene. Blouse and petticoat were burnt and she was responding to commands i.e. whatever I was asking she was responding.

I found 94% superficial to deep burn injuries as follows :

10. During the arguments, as mentioned above, the evidence of all these dying declarations was heavily assailed on behalf the appellants specifically pointing out that as the patient had sustained 94% burn injuries and mostly on her hands and even on palm, there was no any chance of said victim to be so conscious to give details of the incident. It is also argued that the endorsement of the Medical Officer only to the effect of consciousness of the victim is not sufficient and something more is required as to orientation of the victim or the specific mentioning as to fit state of mind of the victim in order to give statement. In support of this argument, shelter of the following authority is taken on behalf of the appellants

Paparambaka Rosamma and Others Vs. State of Andhra Pradesh,

By pointing our attention to para-8 & 9 of the said authority it is submitted that in the present matter there is nothing to ascertain that the patient was in a fit state of mind to give statement and more over it has not been ascertained by the officers recording the dying declaration as to such mental and physical condition of the victim, further argued.

11. We have gone through the ratio propounded by the aforesaid authority of the Hon"ble Apex Court. It must be said that authenticity of dying declaration depends on the facts and circumstances of the case and whether there is any other independent corroboration available. In the present matter, at the cost of repetition, it must be mentioned that there are endorsements of the attending medical officer PW-9 Dr. Madhusudan on both the written dying declarations Exh. 31 & Exh. 11 mentioning that the patient was conscious to give oral statement. All those endorsements made by PW-9 Dr. Madhusudan have been identified by him and as they were proved, they were marked as exhibits and taken on record by the trial Court. Moreover there is a corroboration to the contents of the said dying declaration and that in the present matter there are two oral dying declarations respectively before PW-2 & PW-3 and one history given by the victim herself, apparently in the form of the dying declaration, as to how she had sustained the burn injuries and this history was given to PW-9 Dr. Madhusudan, as mentioned earlier. Again on this aspect, our attention is drawn towards the ratio propounded by the another authority

By pointing to the contents of para-14 of the said authority, it is submitted that though the conviction can be recorded on the basis of the dying declaration alone, but, the same must be wholly reliable. In other words, it is argued that if there is any suspicion in putting reliance on such dying declaration, then it would not be safe to convict the accused person solely on the strength of such dying declaration. There cannot be dispute on the said legal proposition as propounded in the said authority. What is to be ascertained is whether the dying declaration given by the victim inspires confidence or whether there are any material defects or any circumstances so as to suggest that it was impossibility on the part of the victim to give any such statement implicating the accused persons. Moreover, whether or not a particular dying declaration is acceptable, is to be viewed in juxtaposition of the circumstances of that particular case. In the case at hand, we had observed that there are two written dying declarations, as discussed above, so also there are two oral dying declarations and there is history apparently in the form of history given to the medical officer (PW-9). In all these dying declarations, the main thread of the case of the prosecution has not in any way changed. In other words, it must be said that all these dying declarations unequivocally point towards the appellants/accused persons and mainly the present appellants, as perpetrators of the crime of pouring kerosene and setting the victim on fire. In any event considering the facts of the present case, we are of the considered view that these dying declarations are reliable and can safely be taken as implicating both the appellants/accused for the offences charged.

12. Another argument was advanced on behalf of the appellants/accused regarding the possibility or otherwise of taking thumb impression of the victim at the end of the dying declarations - which are Exh. 31 & Exh. 11. On this aspect, our attention is drawn to the substantive evidence of PW-9 Dr. Madhusudan and specifically regarding the injuries sustained by the victim. The injuries of the victim are earlier reproduced with advantage. Mentioning those injuries, it is argued that both the hands and also palms of the victim were burnt. By this answer given by PW-9, attending doctor in his evidence, it is tried to suggest that there was no possibility that a thumb impression of the victim could be taken. On this, we have carefully gone through the substantive evidence of PW-4 Special Judicial Magistrate. During the cross-examination, the said witness has specifically answered to the following effect:

left hand of Yellamma was not burnt and I had not seen her right hand. It is true that when we obtained thumb impression, we write the attestation. I have not obtained the signatures of other persons who are acquainted with Yellamma.

When we read this substantive evidence in juxtaposition of the factual position appearing and apparent on the face of Exh. 11 that her thumb impression of left hand thumb has been obtained and there is an endorsement of the said Special Judicial Magistrate as it was obtained in his presence. Considering in totality the evidence of the attending medical officer PW-9 Dr. Madhusudan and considering

that specifically there is no cross-examination of any of the prosecution witnesses and mainly PW-9 Dr. Madhusudan and also another doctor PW-5 who performed the postmortem as to suggesting them that even all the fingers of the victim were also burnt and it was total impossibility for obtaining her thumb impression on any of the documents. In that event, considering the factual position, the said argument advanced on behalf of the appellants/accused cannot sustain.

13. Lastly, during the arguments it is submitted that there was no cause for the appellants/accused to kill the victim. Moreover it is pointed out that the marriage took place only four months prior to the incident and according to the substantive evidence of the witnesses and even as per the mention of the victim in her dying declaration Exh. 31, she was treated well for four months. On this aspect, we have gone through the said contents of Exh. 31, which is dying declaration recorded by PSI Jadhav. It is recorded in vernacular Marathi and to the effect that marriage took place in September, 2004 with Venkatesh and on the next line it is mentioned that after the marriage she was treated properly for four months, but, for last two months her husband and her in-laws were ill-treating her on alleging that she had illicit relations with her maternal uncle Krishna Mhetre. If these entire contents are construed in proper perspective coupled with the substantive evidence of PW-2 & PW-3, we find that they specifically mention that the marriage took place six months prior to the incident and for last two months there were incidents of ill-treatment, it can be said that there is nothing to doubt the case of the prosecution as to there was ill-treatment at least for about two months prior to the incident.

14. It was also argued at the fag end of the argument that there was possibility or, in fact, it was a case of suicide inasmuch as victim was apparently suffering from TB and was having stomach ache and out of frustration due to the said ailment, she had ended her life. This type of defence is spelt out from the written submissions given by the appellants/accused at the end of recording of their statements u/s 313 of Cr.P.C. Though such attempts have been made to assert that the victim had committed suicide, there is nothing brought on record except bare mention in the submissions that the disease of the victim was of such a grave character so that she felt to end her life and that also when she has reached at Solapur at the house of her in-laws from Pune at the early hours of the same day and to pour kerosene at that house and end her life. In other words, even on preponderance of probabilities, this defence raised on behalf of the appellants/accused cannot be accepted, more so, when there is nothing brought on record that the said disease was active and aggravated after marriage. Though such suggestion was given to PW-2 paternal uncle of the victim, he had denied that even after the marriage she was suffering from some ailment like T.B. and also stomach ache. Again this probable defence of alleged suicide committed by the victim cannot be accepted as there is no plausible explanation coming from the appellants/accused in order to explain how and in what manner the victim sustained such severe burn injuries when it is admittedly

case of custodial death. Moreover it was also brought to our notice that appellant/accused No. 2 had also sustained about 2% burn injuries and it was probably on account of saving the victim when she had caught fire at the matrimonial home. It is an admitted position that appellant/accused No. 2 had sustained these burn injuries, however, still there is nothing on record to show that after the victim caught on fire, any attempts were made by any of the appellants/accused to take her to the hospital for immediate medical treatment. From the substantive evidence of PW-2 & PW-3 and also of the attending doctor PW-9 it is a factual position that there was no attempt on the part of the husband and in-laws of the victim to take her to hospital. Even there is nothing on record to accept on preponderance of probabilities that it was a case of suicidal burn and appellant/accused No. 2 tried to rescue his wife. Another factual aspect cannot be ignored that if at all it is a suicide case then the victim has sustained almost 94% burn injuries, whereas her husband who tried to save her had sustained only 2% burn injuries. All the same, this attempt on the part of the appellants/accused to put forth this defence is also futile and cannot sustained. In view of the above, there is nothing to interfere with the impugned judgment and order of conviction and accordingly there is no merit in the appeal. Same is accordingly dismissed and disposed of. Present order be communicated to the appellants/accused through the concerned jail authorities where they are presently lodged.